IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 19, 2006 Session

STATE OF TENNESSEE v. CHARLES NATHAN BOLING

Appeal from the Criminal Court for Sullivan County
Nos. S-51-055, S-48-515, S-48-514, S-48-513 R. Jerry Beck, Judge

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No. E2005-02858-CCA-R3-CD - Filed March 14, 2007

The defendant, Charles Nathan Boling, is aggrieved of his incarcerative sentence on his guilty pleas to multiple property-related offenses and a charge of attempt to obtain a controlled substance by fraud committed in Sullivan County. He insists on appeal that his age and the lack of a "long history" of criminal conduct merit suspending his sentence and placing him on probation or imposing a sentencing alternative to incarceration such as "half-way" house supervision or participation in a "boot camp" program. We disagree and affirm the trial court's sentencing determination.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID H. WELLES, J., joined.

Frank L. Slaughter, Jr., Bristol, Tennessee, for the Appellant, Charles Nathan Boling.

Robert E. Cooper, Jr., Attorney General & Reporter; Cameron L. Hyder, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Rebecca H. Davenport, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The record before us is meager. We discern that Gail Coffey, Sue Seats, Dustin Johnson, Bobby Sanders, Darleen Barrera, Carl Owens, Roy Sams, Steve Rathbone, Robert Hicks, Brian Morrell, Rodney Williams, Gary Baker, Brian Lancaster, Bobby Hite, Ricky Burke, and LaRue Miles shared a common experience. During an eight-day period, October 12, 2003, November 5, 6, 7, 8, and 9, 2003, and April 6 and 7, 2004, the defendant broke into and vandalized their automobiles. In some instances, the defendant stole personal property from the automobiles, including Ms. Seats's checkbook, which he used to forge a check on November 8, 2003. The previous month, on October 13, 2003, the defendant had burglarized the residence of James Lewis and stole Mr. Lewis's cash, guns, knife, jewelry, and medication, and on October 17, 2003, he had attempted to obtain Lortab, a controlled substance, by fraud.

The defendant's crime spree resulted in criminal charges consisting of one count of aggravated burglary, four counts of theft over $500, 15 counts of automobile burglary, 10 counts of vandalism under $500, three counts of vandalism over $500, five counts of theft under $500, one count of forgery, one count of theft over $10,000, and one count of attempt to obtain a controlled substance by fraud. The defendant pleaded guilty to all 41 charges. In his brief, the defendant contends that he "received a stacked effective sentence of eight (8) years and $550.00 in fines." According to the State, the judgments of conviction in the record, however, appear to reflect an effective sentence of six years "for the cases being appealed."

We begin by taking note of the following matters that do and do not appear in the record before us. First, the record on appeal contains 41 separate judgments of conviction. Thirty-nine of the judgments recite that the defendant pleaded guilty on April 28, 2004, and the date December 15, 2005, appears on two of the judgments as the plea submission date. The judgments bear the signature of the trial judge and a written notation identifying March 1, 2006, as the date of entry of the judgments; each judgment also contains a file-stamped date of March 1, 2006.

Second, the defendant's notice of appeal was filed on December 16, 2005, prior to the date that the conviction judgments were entered. The notice of appeal references the following case numbers being appealed: S-51-055, S-48-515, S-48-514, and S-48-513.

Third, a transcript of a hearing conducted on December 15, 2005, is part of the record before us. That transcript discloses that the defendant pleaded guilty to an information in case number S-51-055, charging one count of automobile burglary and one count of theft less than $500. The transcript further discloses that on that same date, the defendant received an effective incarcerative sentence of one year in case number S-51-055, and the trial court denied probation and alternative sentencing in case numbers S-48-513 and S-48-514. The record in this case does not include transcripts of the plea submissions in any case other than S-51-055; also absent from the record are any sentencing transcripts related to the trial court's length-of-sentence determinations and sentence alignments in case numbers S-48-515, S-48-514, and S-48-513.

Fourth, the transcript of the December 15, 2005 hearing reflects that defense counsel indicated that the effective sentence for all 41 counts would be nine years. At that hearing, the trial court stated, "His sentence is a total of ten years . . . it is eight years plus the one that he plead[ed] guilty to today, so it is nine years, Range I."

Last, at the December 15, 2005 hearing, the trial court remarked,

> The Defendant's record is terrible. His social history is terrible, except he has indicated that he has come to some point in his life, where, now, he is going to do better, and that is certainly admirable and it is certainly good that these people came in and testified for him, but there is no way in the world I could put this Defendant on any type of probation or alternative sentencing.

Based on our review of the 41 judgments of conviction, the defendant received four years of supervised probation for 36 of his convictions and an effective incarcerative sentence of five years for the remaining five convictions, producing an aggregate sentence of nine years. Because the defendant confines his argument on appeal to the denial of probation or alternative sentencing, the only issue before us relates to the incarcerative sentences imposed in case numbers S-48-513, S-48-514, and S-51-055.

In case number S-48-513, the defendant pleaded guilty to aggravated burglary (Count 1) and theft over the amount of $500 (Count 2). The trial court imposed a four-year sentence for aggravated burglary and a one-year sentence for theft and ordered concurrent service of the sentences. In case number S-48-514, on the sole conviction of attempt to obtain a controlled substance by fraud, the trial court imposed a two-year sentence and ordered concurrent service with the sentence imposed in case number S-48-513. In case number S-51-055, the trial court imposed a one-year sentence for burglary of an automobile and a sentence of 11 months and 29 days for theft; the court ordered that these two sentences be served concurrently with each other but consecutively to the sentences in case numbers S-48-513, S-48-514, S-48-515,[1] and S-48-756.[2]

Although the defendant's notice of appeal was filed slightly more than two months before the judgments of conviction were entered, the notice is still effective for appellate purposes. Appellate Rule 4(d) provides, "A prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof." Tenn. R. App. P. 4(d). Therefore, although the defendant's notice of appeal predated the conviction judgments, the notice is treated as timely filed as of the date the conviction judgments were filed, March 1, 2006.

Turning to the merits of the defendant's appeal, when there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant, and in the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, after determining the range of sentence and the specific sentence, then determines the propriety of sentencing alternatives by

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[1] In case number S-48-515, the defendant received supervised probation for each guilty-pleaded offense.

[2] The record contains no information about case number S-48-756, and the defendant did not include this case number on his notice of appeal.

considering (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-210(a), (b), 40-35-103(5) (2003); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

As relates to case numbers S-48-513, S-48-514, and S-51-055 the defendant is a standard, Range I offender convicted of Class C and Class E felonies and a Class A misdemeanor. As such, he is presumed to be a favorable candidate for alternative sentencing options, "in the absence of evidence to the contrary." T.C.A. § 40-35-102(6) (2003). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration." *Id*. § 40-35-102(5). A defendant's presumption of favorable candidacy for alternative sentencing may be rebutted; not all offenders who enjoy the presumption receive an alternative sentence. Rather, sentencing issues are determined by the facts and circumstances presented in each case. *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

In addition, the defendant was statutorily eligible to receive a suspended sentence. *See* T.C.A. § 40-35-303(a) (2003). However, the determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish his "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b) (2003); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest[s] of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10.

The trial court had no evidence before it that allowing the defendant to serve a suspended sentence would serve the ends of justice and the best interests of both the public and the defendant. The defendant called two witnesses in support of his bid for probation and/or alternative sentencing. Brook Smith testified that he formerly was employed as a corrections officer at the Washington County Virginia Sheriff's Department where he became acquainted with the defendant who was a jail trustee. Mr. Smith testified that the defendant was "very quiet and kept a low key and just had the over-all manner that he just wanted to get his time over with and get on with his life." Mr. Smith stated that he still maintained contact with the defendant, including attending church with him.

John Branch, a pastor, testified that he had been counseling the defendant for approximately four months, since the defendant was discharged from the Virginia penal system. Mr. Branch said that the defendant also attended church on a regular basis. Mr. Branch testified that the defendant had "done very well" with counseling and had "come along well." The defendant also offered favorable letters from his supervisors at work and a certificate of completion for the "Addiction Severity Index."

As did the trial court, we detect no such proof in the record that allowing the defendant to serve a suspended sentence would serve the ends of justice and the best interests of both the public and the defendant, and we hold that the defendant has failed to carry his burden of demonstrating suitability for full probation.

Turning to the presumption of favorable candidacy for alternative sentencing that applied to the defendant, the record supports the trial court's imposition of an incarcerative sentence. As the State pointed out to rebut the favorable candidacy presumption, the defendant has a criminal history in addition to the 41 offenses to which he pleaded guilty; the presentence investigation report noted numerous convictions in Virginia for grand larceny and credit card fraud and theft. *See* T.C.A. § 40-35-103(1)(A) (2003) (providing that confinement is appropriate when necessary to protect society by restraining an individual who has a long history of criminal conduct). The defendant's employment history included being fired from one job for violating a drug policy and being paid "under the table" on another job, whereby he filed no tax returns and kept no records. He admitted to being "hooked" on drugs when he committed the offenses. The trial court evaluated all of the evidence before it and concluded that the potential for rehabilitation was very low.

In our view and in summary, the record supports the manner of service of the sentence imposed. The defendant failed to carry his burden to show entitlement to probation, and the presumption of alternative sentencing was sufficiently rebutted in this case. The trial court thus did not err by imposing a sentence of confinement.

Accordingly, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE